



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 29, 1998

Dr. Richard Raves
Vice Chancellor-General Counsel
University of North Texas
P.O. Box 310907
Denton, Texas 76203-0907

OR98-2547

Dear Dr. Raves:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 119022.

The University of North Texas (the "University") received a request for information for "[r]ecords of investigation of wrongdoing by Nancy Stephens of the North Texas Police and official reports concerning an investigation of Nancy Stephens" and for "[t]he official title/position and the rate of pay for Nancy Stephens"

You submit to this office representative samples of the information requested.¹ You also submit to this office a copy of a letter dated July 31, 1998 in which Ms. Stephen's attorney threatens to litigate Ms. Stephen's demotion "if the grievance process is not completed to my client's satisfaction." David Wethe, editor of the North Texas Daily, submits to this office a complaint dated August 8 that you failed to provide to his

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

paper the requested information about the pay rate and current job title of Ms. Stephen when you provided it to the Denton Record-Chronicle.²

The Act requires that the officer for public information must “promptly produce public information” in response to an open records request.” Gov’t. Code § 552.221(a). The information released to The Denton Record-Chronicle and any other information requested by The North Texas Daily not subject to the claim of an exception under the Act should have been released to The North Texas Daily promptly upon request. It appears that the information on Attachment D was previously released to the Denton Record-Chronicle. If the information was previously released to the Denton Record-Chronicle, it must be released to The North Texas Daily also.

You claim that the requested information, divided by you into Attachments D, E, F, G, H, I, J, K, and L, is excepted from disclosure under sections 552.101, 552.102, 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. For many years, this office has held that certain information must be disclosed about public employees, including name, position, experience, tenure, salary and educational level. Open Records Decision Nos. 342 (1982), 165 (1977), *See also* Open Records Decision Nos. 277 (1981); 215 (1978); 157 (1977). Attachment D, a list of the job titles and salaries of Ms. Stephens at the University, must be disclosed to the requestor.

We first address your claim under section 552.103. Section 552.103(a), the

²The University must treat all requests for information uniformly. Section 552.223 of the Act provides,

“The officer for public information or the officer’s agent shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media.”

In addition, section 552.007 prohibits the University from selectively disclosing information that is not confidential by law but that a governmental body may withhold under an exception to section 552.021 of the Government Code.

(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) Public information made available under Subsection (a) must be made available to any person.

Gov’t. Code § 552.007

“litigation exception,” excepts from disclosure information relating to litigation to which the state is or may be a party. The University has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.³ Thus, under section 552.103(a) a governmental body’s burden is two-pronged. The governmental body must establish that (1) litigation to which the governmental body is a party is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See University of Texas Law School v. Texas Legal Foundation*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no writ); Open Records Decision No. 551 at 4 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the fact that an individual hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Litigation is not reasonably anticipated when an individual who was rejected for employment hires an attorney to investigate the circumstances of the rejection. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

³Section 552.103(a) excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You claim that the letter from Mr. Case to you dated July 31, 1998 is an unequivocal statement of intent to pursue litigation; however, Mr. Case's threat of litigation is explicitly conditioned on completion of the University's grievance procedure. Mr. Case threatens to litigate "if the grievance process is not completed to my client's satisfaction." We have considered your arguments and conclude that you have made the requisite showing that litigation is reasonably anticipated and, therefore, you may withhold information under section 552.103.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to all of the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation.⁵ Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5, 511 at 3 (1988).

You assert that the records contained in Attachment H are education records protected from disclosure to the public in accordance with the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The University may withhold from disclosure information that is protected by FERPA without the necessity of requesting a decision from this office. Open Records Decision No. 634 (1995). However, as you have sought a decision from this office, we will address your argument against disclosure. Section 552.026 of the Government Code excepts from disclosure educational records unless released in conformity with FERPA. FERPA provides that federal funding shall not be made available to "any educational agency or institution which has a policy or

⁵The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 at 3 (1989) ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Open Records Act to discovery process).

practice of permitting the release of educational records” of students without the written consent of the parents of a minor student. 20 U.S.C. § 1232g(b)(1). Education records are those records that “contain information directly related to a student and are maintained by an educational agency or institution.” *Id.* § 1232g(a)(4)(A). FERPA provides that if the student is 18 years of age or older or attends a postsecondary educational institution, the student must give written consent to allow the release of education records. *Id.* § 1232g(d).

Only information which would serve to identify the student is excepted from disclosure under FERPA. Open Records Decision No 332 at 3(1982). In this situation, because the requestor has asked specifically for records that pertain only to Ms. Stephens, the responsive records generally serve to identify the student. Without a valid consent to release these records, the education records at issue are confidential and may not be disclosed. We do not believe that the last page of Attachment H is an education record covered by FERPA. We have marked the records in Attachment H to indicate what may be withheld.

You state that Attachment I is a representative sample of your hand written notes and of e-mails in which your advice was sought or provided. You contend that these documents are protected by the attorney-client privilege.⁶ Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Moreover, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records No. 630 at 4 (1994). Portions of the information contain confidential client communications and an attorney’s legal advice or opinion, and therefore may be withheld from public disclosure under section 552.107(1) if the attorney-client privilege has not been waived by disclosure of this information to a third party. We have marked this information accordingly.

In asserting that sections 552.101 and 552.102 apply to protect some or all of the requested information, you argue that, “To have any information regarding this

⁶You state that Attachment I contains e-mails that may have been released to Ms. Stephens in order to allow her to prepare her appeal. When a governmental body voluntarily discloses privileged material to a third party, it waives the attorney-client privilege. Tex. R. Civ. Evid. 511, Open Records Decision No. 630 (1994).

matter released at this stage in the appeals process, when the disciplinary action is not final, would be highly embarrassing to Ms. Stephens and is not of legitimate concern to the public at this time.” You also state that, “documents regarding these matters may be protected from disclosure by §552.101 and §552.102, since the University has not taken action against Ms. Stephens at this time or made a final determination in regard to either of these matters.” A governmental body may not withhold a personnel file in its entirety under section 552.102. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Foundation*. Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Financial information concerning an individual is in some cases protected by a common-law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that “all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.” Open Records Decision No. 373 at 3 (1983). As we believe that no legitimate public interest exists in Ms. Stephens’s checking account, we conclude that you must withhold from public disclosure this piece of information.

Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in the job performance of public employees. *See* Open Records Decision Nos. 444 (1986), 405 (1983). This office has previously held that a common-law right of privacy does not protect facts about a public employee’s misconduct on the job or complaints made about her performance. *See* Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979). You urge that the representative sample of documents concerning Ms. Stephens in Attachment J do not constitute “investigations of wrongdoing.” Given the public purpose of the Act, we disagree. The University must make a good faith effort to relate a request to information which it holds. Open Records Decisions No. 561 (1990) and 87 (1975). Further, the Act must be liberally construed in favor of granting a request for information. Gov’t. Code §551.001(b). We have

reviewed the sample of documents that you have provided and we have marked the information excepted by common-law privacy as encompassed by sections 552.101 and 552.102 of the Government Code. If you have waived the litigation exception of section 552.103 by providing documents to adverse parties, the documents protected by common-law privacy must be withheld from disclosure nevertheless.

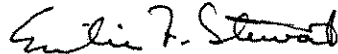
Lastly, we note the documents contain the home address, telephone number, social security number of Ms. Stephens, and information revealing whether Ms. Stephens has family members. Section 552.117(2) of the Government Code excepts from required public disclosure whether a peace officer has family members as well as the social security number and former and current home addresses and home telephone numbers of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. Open Records Decision No. 622 (1994). Assuming that Ms. Stephens meets the definition of a peace officer, you must redact such information wherever it appears in the requested information.

If Ms. Stephens is not a peace officer, it is possible that this information may be confidential under section 552.117(1) of the Government Code, and therefore, depending on the specific circumstances, may not be released. Section 552.117(1) excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or personal family members information of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117(1) requires you to withhold this information if Ms. Stephens requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of Ms. Stephens if she is not a peace officer and if she made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

Moreover, social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the University pursuant to any provision of law, enacted on or after October 1, 1990.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,


Emilie F. Stewart
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 119022

Enclosures: Submitted documents

cc: Jeffrey Fielder
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(w/o enclosures)